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In the Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

vs.

JERRY TARKANIAN,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the action of the NCAA in directing one of its members, a state university, to show cause why it should not temporarily suspend an employee from his duties relating to intercollegiate athletics for violating the Association's rules, constitutes state action, where the member university, in compliance with NCAA rules, suspends the coach from coaching.

TABLE OF CONTENTS

QUESTION PRESENTED 1
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2
STATEMENT OF THE CASE 3
I. THE HISTORY AND STRUCTURE OF THE NCAA 4
II. THE PROCEDURES FOLLOWED IN THE UNLV CASE 8
III. PROCEEDINGS IN THE LOWER COURTS 15
SUMMARY OF ARGUMENT 17
ARGUMENT 20
I. PRIVATE ACTION MAY BE TREATED AS STATE ACTION UNDER THE FOURTEENTH AMENDMENT ONLY WHEN IT IS FAIRLY ATTRIBUTABLE TO THE STATE 21
II. TARKANIAN'S ALLEGATIONS IN THIS CASE FAIL TO SATISFY EITHER OF THE REQUIREMENTS IDENTIFIED IN *LUGAR* 25
A. The NCAA's Action Is Attributable To Private Rules And Not To State Law 26
B. The NCAA Is Not A State Actor 34
1. The NCAA Does Not Perform A Public Function 35
2. Tarkanian Has Failed To Show The Required Nexus Between The State And The NCAA's Action 42
CONCLUSION 48

TABLE OF AUTHORITIES

Cases

Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) 22, 36
Arlosoroff v. N.C.A.A., 746 F.2d 1019 (4th Cir. 1984) 26, 39
Associated Students, Inc. v. N.C.A.A., 493 F.2d 1251 (9th Cir. 1974) 26
Baldwin v. Morgan, 287 F.2d 750 (5th Cir. 1961) 34
Blum v. Yaretsky, 457 U.S. 991 (1982) ..... *passim*
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 23, 24, 37, 45
Evans v. Newton, 382 U.S. 296 (1966) 22
Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) 27, 28, 36, 41
Fuentes v. Shevin, 407 U.S. 67 (1972) 26
Gilmore v. Salt Lake Community Action Program, 710 F.2d 632 (10th Cir. 1983) 27
Graham v. N.C.A.A., 804 F.2d 953 (6th Cir. 1986) 26, 39
Hawkins v. N.C.A.A., 652 F.Supp. 602 (C.D. Ill. 1987) 26
Howard University v. N.C.A.A., 510 F.2d 213 (D.C. Cir. 1975) 26
Hudgens v. N.L.R.B., 424 U.S. 507 (1976) 36
Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) ..... *passim*
Karmanos v. Baker, 816 F.2d 258 (6th Cir. 1987) 26
Kneeland v. N.C.A.A., 650 F.Supp. 1047 (W.D. Tex. 1986) 26

Lloyd Corp., Limited v. Tanner, 407 U.S. 551 (1972) 36
Lovell v. City of Griffin, Ga., 303 U.S. 444 (1938) 21
Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982) ..... *passim*
McHale v. Cornell University, 620 F.Supp. 67 (N.D. N.Y. 1985) 26
Marsh v. State of Alabama, 326 U.S. 501 (1946) 22, 35, 37, 39
Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 23, 24, 28, 48
N.C.A.A. v. Board of Regents of University of Oklahoma, 468 U.S. 85 (1984) 31
Nixon v. Condon, 286 U.S. 73 (1932) 21, 39
Nixon v. Herndon, 273 U.S. 536 (1927) 21, 39
Parish v. N.C.A.A., 506 F.2d 1028 (5th Cir. 1975) 26
Peterson v. City of Greenville, 373 U.S. 244 (1963) 28, 34
Polk County v. Dodson, 454 U.S. 312 (1981) 25, 27
Public Utilities Commission v. Pollak, 343 U.S. 451 (1952) 22-23
Raymond v. Chicago Union Traction Co., 207 U.S. 20 (1907) 21
Rendell-Baker v. Kohn, 457 U.S. 830 (1982) .....*passim*
San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. ....., 107 S.Ct. 2971, 55 U.S.L.W. 5061 (1987) .....*passim*
Saunders v. Shaw, 244 U.S. 317 (1917) 21
Shelley v. Kraemer, 334 U.S. 1 (1948) 21, 22
Smith v. Allwright, 321 U.S. 649 (1944) 21, 39
Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969) 26
Terry v. Adams, 345 U.S. 461 (1953) 21, 22, 39

Tulsa Professional Collection Services, Inc. v. Pope, 56 U.S.L.W. 4302 (U.S., April 19, 1988) 42

Constitutional Provisions

U.S. Const. Amend. XIV, § 1 .....*passim*

Statutes

28 U.S.C. § 1257(3) (1970 as amended) 1
42 U.S.C. § 1983 (1979 as amended) 2, 16, 17, 20, 21
42 U.S.C. § 1988 .....16, 17
42 U.S.C. § 1396 *et seq.* (1976 as amended) 28
Pa.Stat.Ann.,Tit. 66, § 1171 (1959) 43

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Nevada (J.A. 45-61) is reported at 741 P.2d 1345 (Nev. 1987). The opinion of the Nevada district court (J.A. 16-44) is not reported.

JURISDICTION

The judgment of the Nevada Supreme Court was entered on August 27, 1987. This Court granted petitioner an extension of time to and including December 25, 1987 to file a petition for writ of certiorari. The petition for writ of certiorari was filed on December 23, 1987, and was granted on February 22, 1988. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment XIV, Section 1, to the United States Constitution states, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law.

42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

University of Nevada Las Vegas ("UNLV") is a branch of the University of Nevada system and a member of the National Collegiate Athletic Association (the "NCAA") (NCAA's Trial Ex. 16, 175).[1] The NCAA is a private, voluntary association[2] of approximately 960 members[3] consisting of public and private four-year colleges and universities, conferences, associations and other educational institutions (Plaintiff's Trial Ex. 16, 148-175).

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1. All references to trial exhibits are cited herein as "Plaintiff's Trial Ex. " or "NCAA's Trial Ex. ". All references to the trial transcript are cited herein as "Tr. ". All references to the Joint Appendix are cited herein as "J.A. ".

2. Unless otherwise noted, all facts concerning the organization, rules and procedures of the NCAA discussed herein are applicable to and were in effect during all times relevant to this action. Many such facts are taken from the 1976-77 NCAA Manual, Plaintiff's Exhibit 16, pertinent portions of which are reproduced in the Joint Appendix at pages 77 through 110. The Association rules and procedures are updated and revised regularly by the membership. The enforcement program in particular (i.e., J.A. 97-110) has been the subject of numerous revisions and modifications (Tr. XI 2825-2830).

3. Article Four of the NCAA Constitution, as it appeared in the 1976-77 NCAA Manual and as reproduced in the Joint Appendix at page 82, sets forth guidelines for eligibility for membership in the Association:

> **Section 1. Eligibility for Membership.** Colleges, universities, other institutions of learning, athletic conferences or associations and other groups related to intercollegiate athletics, located in the United States, its territories or possessions, with acceptable academic standards as defined in the Bylaws, which accept and observe the principles set forth in the Constitution and Bylaws of the Association, are eligible for membership in this Association.

I. THE HISTORY AND STRUCTURE OF THE NCAA.

The NCAA was founded by a small group of colleges and universities in 1906, at the urging of President Theodore Roosevelt, primarily to adopt civilized rules of play for intercollegiate sports. The following are the two fundamental policies of the NCAA adopted by the membership:

> (a) The competitive athletic programs of the colleges are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and by so doing, retain a clear line of demarcation between college athletics and professional sports.
>
> (b) Legislation governing the conduct of intercollegiate athletic programs of member institutions shall apply to basic athletic issues such as admissions, financial aid, eligibility and recruiting; member institutions shall be obligated to apply and enforce this legislation, and the enforcement program of the Association shall be applied to an institution when it fails to fulfill this obligation.

(J.A. 80).

The general policies and all rules of the Association are voted on by the member institutions at annual conventions (J.A. 86). Each member is entitled to one vote in matters voted on at Association meetings (J.A. 85). The NCAA Constitution, Bylaws and all other governing rules

and interpretations are set forth in the NCAA Manual, published annually (J.A. 86). Member institutions and their coaches (including Respondent Jerry Tarkanian as head coach of UNLV's intercollegiate basketball program [Tr. VIII 1981; XI 2902]) agree to abide by the rules and regulations adopted by member institutions which govern the conduct of intercollegiate athletics (J.A. 82). All member institutions are bound by such rules as an obligation of membership (J.A. 82).

The establishment and general policy of the Association between conventions is committed to the NCAA Council (J.A. 84). Members of the Council must be on the staff of a member institution, and are elected by the Association membership at the annual convention of the Association (J.A. 84).

In the early 1950's, the membership recognized a need to control the recruitment and professionalization of college athletes who, the membership felt, were being abused by some institutions. A majority of the members assembled at one of the annual conventions adopted a "sanity" code governing the recruitment, admissions, financial aid and eligibility of students who compete in intercollegiate athletics. This code also established an enforcement apparatus, which has existed with revisions and modifications since that time ("the enforcement program"), wherein each member agrees to conduct its intercollegiate athletic programs in accord with the membership rules, and to take appropriate action when infractions of the rules come to its attention (J.A. 81, 82, 97, 99, 106).

The Committee on Infractions (the "Committee"), one of the standing committees provided for in the Association's Bylaws (J.A. 94-95), is responsible for admin-

istering the Association's enforcement program (J.A. 97). The Association's enforcement program (J.A. 97-110) provides a structural framework for investigation and enforcement of the rules adopted by the Association membership (J.A. 97-98). Members of the Committee on Infractions (who, like the members of the Council, must be on the staff of a member institution [J.A. 95]) are appointed by the Council and act subject to the approval of the Council (J.A. 94). The Committee in 1976-77 was composed of three professors of law, one professor of mathematics and the Dean of a graduate school who were employees of five different member institutions.[4]

In administering the enforcement program, the Committee is guided by investigative and enforcement procedures adopted by the NCAA membership and published in the Official Procedures Section of the Manual (J.A. 97-110). Although the Committee is charged with administering the enforcement program, the chief investigative and enforcement functions of the program are the responsibility of the individual member institutions of the Association, as is noted in the preamble to the enforcement program:

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4. In the UNLV case, the members of the Committee were: Arthur Reynolds, Dean of the Graduate School, University of Northern Colorado, Chairman; Charles Alan Wright, Professor of Law, University of Texas; Harry M. Cross, Associate Dean and Professor of Law, University of Washington; John W. Sawyer, Professor of Mathematics, Wake Forest University; William L. Mathews, Professor of Law, University of Kentucky (Tr. VIII 1923).

Official Procedure Governing The NCAA Enforcement Program

As approved and adopted by the Council and Convention of the Association

Individuals employed by or associated with member institutions for the administration, the conduct or the coaching of intercollegiate athletics are, in the final analysis, teachers of young people. Their responsibility is an affirmative one and they must do more than avoid improper conduct or questionable acts. Their own moral values must be so certain and positive that those younger and more pliable will be influenced by a fine example. Much more is expected of them than of the less critically placed citizen.

All representatives of educational institutions are expected to cooperate fully with the NCAA investigative staff, Committee on Infractions and Council to further the objectives of the Association and its enforcement program. The enforcement procedures are an essential part of the intercollegiate athletic program of each member institution and require full and complete disclosure by all institutional representatives of any relevant information requested by the NCAA investigative staff, Committee on Infractions or Council during the course of an inquiry.

(J.A. 97).

II. THE PROCEDURES FOLLOWED IN IN THE UNLV CASE

In the early 1970's, the NCAA enforcement staff received several anonymous communications to the effect that violations of NCAA rules may have occurred at UNLV. By letter dated November 28, 1972 (NCAA Trial Ex. C), the President of UNLV was advised that the investigative staff was initiating a preliminary inquiry into the athletic policies and practices of UNLV (NCAA's Trial Ex. C). As was noted in that letter, the "purpose of the preliminary inquiry is to determine whether there is adequate evidence to warrant an official inquiry" (NCAA's Trial Ex. C). Although this "preliminary inquiry" was sent to the President of UNLV several months before Tarkanian was hired by UNLV, Tarkanian became head basketball coach of UNLV during the course of the subsequent investigation.

In 1976, based upon information learned by the investigative staff during the preliminary investigation which indicated several possible violations of membership rules, the Committee sent to UNLV an Official Inquiry (NCAA Trial Ex. D) and a Supplemental Official Inquiry (NCAA Trial Ex. E) which contained 78 detailed paragraphs of possible violations. The UNLV basketball program, under the operation of Mr. Tarkanian (Tr. XI 2902), was implicated in roughly one-half of the paragraphs.[5] This Official Inquiry, pursuant to membership policy (J.A. 99), asked

5. Although, as noted above, the investigation of the UNLV athletic department began before Tarkanian began his employment with UNLV, the Committee on Infractions and NCAA Council later determined Tarkanian was involved in a violation of NCAA legislation approximately two weeks after the date he began employment with UNLV (J.A. 186).

UNLV to investigate the allegations and report its findings to the Committee (NCAA Trial Ex. D, E). The Inquiry identified the membership rules, bylaws and constitutional provisions which were involved, as well as the circumstances and individuals who were involved in possible rules violations (NCAA's Trial Ex. D, E; Tr. VIII 1927, 1988-90). An Official Inquiry is intended to guide the institution to develop fully and independently as much or more information as was developed by the NCAA staff (J.A. 99; Tr. VIII 1926, 1934).

Consistent with the established enforcement procedure (J.A. 99), the NCAA enforcement staff continued to investigate the allegations. UNLV and Tarkanian and their respective lawyers also conducted their separate investigation (Tr. VIII 2142-44). The Committee had none of the discovery powers granted by judicial rules of procedure nor the subpoena powers ordinarily available to governmental entities. It had to rely upon the NCAA staff and UNLV (the member institution) to locate and obtain information from persons with pertinent information (J.A. 99; Tr. IX 2443, 2453). Some persons demanded and were promised confidentiality (Tr. IX 2453). Otherwise, they would not have disclosed information to the NCAA staff. After UNLV and Tarkanian and four lawyers working on their behalf conducted their separate investigation, they submitted a voluminous response wherein they contended that no vic tions of NCAA rules had occurred (Tr. IX 2175). Although many of the same persons were interviewed, the two separate investigations resulted in widely divergent conclusions concerning whether infractions had occurred (Tr. IX 2211-12).

UNLV requested and was granted a hearing with the Committee to defend itself and Jerry Tarkanian. Being a private association and possessing only the power

granted by the agreement between the member institutions, the Committee on Infractions could not compel witnesses to appear or to speak at the hearings (Tr. VIII 1934). Because it had no power to subpoena witnesses or administer oaths, the Committee had to rely on the good faith of the NCAA staff and UNLV to fairly report what their separate investigations had disclosed.[6]

In the course of the three separate hearings before the Committee which covered more than three full days over roughly one month's time, UNLV, Tarkanian and their respective counsel presented their version of the facts. They challenged the information presented by the NCAA staff and the credibility of the persons who supplied information to the staff, and attacked the investigative techniques and credibility of certain members of the NCAA staff (Tr. IX 2211-12, 2298, 2303). During the hearings, the staff withdrew several of the allegations regarding Tarkanian (Tr. IX 2301-02). Of the seventy-eight allegations contained in the Official Inquiry (NCAA's Trial Ex. D, E; Tr. IX 2426), the Committee on Infractions ultimately found thirty-eight violations of membership rules (Plaintiff's Trial Ex. 17).

The NCAA Enforcement Procedure adopted by the membership provides a broad range of disciplinary measures, from reprimand and censure to more severe sanctions in those instances where violations reflect a gen-

6. Generally the facts reported by the staff and the member institution are reasonably consistent and the Committee determines whether the facts constitute an infraction of the rules and what sanctions, if any, should be assessed. UNLV and Tarkanian, however, not only contested the facts as reported by the investigative staff but they challenged the integrity of the staff in investigating and reporting the facts to the Committee (Tr. IX 2303). This required the Committee and Council to assess the credibility of the investigative staff, the representatives of the institution who investigated the allegations and the purported facts reported by each of them (Tr. X 2594; XI 2764).

eral disregard for the governing rules (J.A. 102-109). A member institution which is found in violation may be required to show cause why further sanctions should not be imposed if it does not take appropriate disciplinary or corrective action against its representatives who are involved in the infractions (J.A. 104-105). Among such sanctions, the NCAA members have approved as appropriate disciplinary or corrective action the temporary suspension of the intercollegiate coaching duties of the head coach and any assistants involved in rules infractions, or severance of relations with the athletic program of any representatives of the institution's athletic interests ("boosters") who may be involved in infractions of the rules (J.A. 105).

The sanctions which the Committee recommended be taken against UNLV in this case, set out in full in the Joint Appendix at pages 178-181, included the following: public reprimand of UNLV along with a two year period of probation, during which the UNLV's intercollegiate basketball program would not be eligible to participate in any postseason basketball competition, nor appear on television (J.A. 178-179); a limit of three basketball scholarships to be given per year during the 1978-79 and 1979-80 academic years (J.A. 179); and an order that UNLV show cause why additional penalties should not be imposed upon it unless it took action to sever from any and all relations with its intercollegiate basketball program for two years its former assistant basketball coach, Fred Albrecht, and unless it took action to sever permanently from any and all relations with its intercollegiate athletic program its former head basketball coach, John Bayer[7], and eight named "boosters"

7. UNLV had fired Bayer as basketball coach in the spring of 1973 (J.A. 185).

(J.A. 180-181). That portion of the recommended sanction concerning Tarkanian (nearly identical to that noted above with respect to former assistant coach, Fred Albrecht) was as follows:

> The Committee on Infractions requests the University of Nevada, Las Vegas, to show cause, in accordance with Section 7-(a)-(12)-(i) of the Official Procedure Governing the NCAA Enforcement Program, pages 119-120, 1976-77 NCAA Manual [J.A. 103-106], why additional penalties should not be imposed upon the University if it does not take appropriate disciplinary and corrective actions with regard to:
>
> * * *
>
> 4. Head basketball coach Jerry Tarkanian which, in the Committee's present view, should be complete severance of any and all relations Tarkanian may have, formally and informally, with the University's intercollegiate athletic program during the period of the University's probation including, but not limited to, activities associated with administration, supervision, coaching, recruiting, athletic booster groups and public relations or fund-raising activities related to the University's athletic program.

(Plaintiff's Trial Ex. 17, 10; *See also* J.A. 180-181).

After the hearings, the Committee issued its written findings on the allegations and recommended disciplinary penalty measures in its Confidential Report, which it forwarded to UNLV on April 26, 1977 (Plaintiff's Trial Ex. 17). UNLV promptly appealed to the NCAA Council some 27 of the Committee's findings and most of the recommended sanctions (J.A. 122-204). UNLV did not appeal some findings and sanctions.[8] All findings and sanctions which involved Tarkanian personally or the intercollegiate basketball program as operated by Tarkanian were appealed (J.A. 122-204).

The Committee delivered to UNLV and to the Council, pursuant to Section 6 of the Enforcement Procedures (J.A. 102), an Expanded Confidential Report concerning each finding and proposed penalty appealed by UNLV (J.A. 122-204). This report included all of the allegations in the Confidential Report, identified the information on which the Committee relied in reaching its decision as to those violations being appealed, and articulated the Committee's rationale in arriving at its findings and proposed sanctions (J.A. 122-204). UNLV also submitted a lengthy written presentation to the Council prior to the hearing (Plaintiff's Trial Ex. 3).

On August 22, 1977, Tarkanian and his counsel, the President and other representatives of UNLV and its counsel, representatives of the NCAA investigative staff and the Chairman of the Committee on Infractions appeared before the NCAA Council (Tr. X 2592; J.A. 122). Professor Arthur Reynolds, Chairman of the Committee, appeared on behalf of the Committee and argued that the Committee's findings and sanctions were supported by facts (Tr. X 2593, 2730).

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8. Confidential Report No. 123(47), reproduced in the Joint Appendix at pages 122 through 204 (also referred to as the Expanded Confidential Report), contains all of the findings of violation of NCAA rules determined by the Committee on Infractions. Those findings and sanctions which were appealed by UNLV are identified by an asterisk (*) in the left margin.

Following the appeal hearing, the Council voted 16-0 to affirm the findings of the Committee on Infractions and to adopt its suggested sanctions (Tr. X 2615). On August 25, 1977, the Council notified UNLV officials that it had accepted the Committee's findings and sanctions. As noted above, one of the proposed disciplinary measures recommended by the Committee was a direction to UNLV to show cause why its remedial action should not include the suspension of Tarkanian from involvement in intercollegiate athletics for the 1977-78 and 1978-79 basketball seasons (J.A. 180-181).

In accord with the NCAA Enforcement Procedures (J.A. 105), the President of UNLV immediately directed his Vice President to convene an administrative hearing for the purpose of allowing Tarkanian an opportunity to present reasons why UNLV should not carry out the recommendation of the Committee and Council that an appropriate disciplinary action would be temporary suspension of Tarkanian from involvement in UNLV's intercollegiate athletic program (J.A. 71).[9] Tarkanian and his counsel participated in that hearing, which took place on September 6, 1977 (J.A. 71). Tarkanian and his counsel argued that the NCAA proceedings were unfair and that the evidence did not support the Committee's

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9. At the time of this hearing, Tarkanian's employment with UNLV was as "Head Basketball Coach and Professor of Physical Education" (J.A. 67). On June 20, 1977, subsequent to the hearings before the Committee on Infractions but prior to the appeal hearing before the Council, Tarkanian had entered into this contract (J.A. 67). This was the first contract between Tarkanian and UNLV which mentioned tenure (*compare* J.A. 207-208 *with* J.A. 67). Although the directive of the Committee on Infractions and Council was that UNLV show cause why Tarkanian should not be temporarily suspended from his coaching duties, the show cause order did not address Tarkanian's employment as a tenured "Professor of Physical Education" (J.A. 181). Indeed, that Tarkanian was to have continued "employment duties" notwithstanding the show cause order is uncontroverted (J.A. 70).

finding that he participated in violations (J.A. 71-76). Tarkanian did not contend that his coaching position was protected by contract, tenure or any other employment relationship he had with UNLV.

On September 7, 1977, Tarkanian was advised by the President of UNLV that he would be suspended from relations with the University's intercollegiate athletic program for two years (J.A. 69-70).

III. PROCEEDINGS IN THE LOWER COURTS

On September 8, 1977, Tarkanian sued UNLV in a Nevada state court (J.A. 16-17). The NCAA was not joined in that action and UNLV refused to remove the action to federal court. Tarkanian sought injunctive relief from the sanctions imposed by the University the day before (J.A. 2). A trial was held roughly one month later, on October 12, 1977 (J.A. 17). The trial court granted Tarkanian the injunctive relief sought, based upon joint stipulations of fact of the parties and the testimony of Tarkanian and four other witnesses called by Tarkanian (J.A. 17). At this trial, "No witnesses were presented for the defense" (J.A. 8). The Nevada Supreme Court reversed for failure to join an indispensable party, the NCAA (J.A. 15).

Tarkanian commenced the second phase of this lawsuit in July, 1979 against both UNLV and the NCAA (J.A. 17). Within 30 days, the NCAA and UNLV filed a joint petition for removal to the United States District Court for the District of Nevada. The case was remanded on motion of Tarkanian, for failure of UNLV to timely remove, in that UNLV had failed to remove within 30 days of receipt of service of process in 1977.

Following remand, the case proceeded to trial in state court. After a two-week bench trial, the trial judge agreed with Tarkanian on most issues (J.A. 16-35). The trial court issued an opinion on June 25, 1984 that the actions of the NCAA constituted state action and that Tarkanian had been deprived of liberty and property interests without procedural and substantive due process of law, all in violation of 42 U.S.C. § 1983 and the Fourteenth Amendment to the Constitution (J.A. 16-35). The trial court permanently enjoined the University and the NCAA from suspending Tarkanian, and from taking any action to enforce the NCAA's sanctions (J.A. 33-35). The trial court later awarded to Tarkanian attorney's fees of nearly $200,000 (J.A. 41-42). The trial court assessed 90% of the fees to NCAA and 10% to UNLV (J.A. 41-42).

The NCAA filed a second petition for removal on July 17, 1984 for two reasons. First, the NCAA contended that it had become apparent at the second trial that the University had been joined as the only original defendant for the purpose of thwarting removal by the NCAA, and that it should be realigned as a plaintiff. Second, Tarkanian's request for attorney's fees under 42 U.S.C. § 1988 constituted a new and independent federal action for removal. The Federal District Court again remanded the case to state court for failure of UNLV to timely petition for removal.

The trial court's judgment was appealed by the NCAA to the Nevada Supreme Court. UNLV did not appeal the trial court's injunction and assessment of attorney's fees. The Nevada Supreme Court, in an opinion issued August 27, 1987, affirmed in most respects (J.A. 45-61). First, it found the NCAA to be a state actor (J.A. 52). Second, it found NCAA procedures did not afford Tarkanian "due process of law" under "the circumstances

of the case" (J.A. 55-58). The Nevada Supreme Court limited the injunction to those penalties imposed with respect to Tarkanian in Confidential Report Number 123 (47) (J.A. 122-204) and UNLV's adoption of those penalties (J.A. 61). It also remanded the issue of the award of attorney's fees against the NCAA under 42 U.S.C. § 1988 to the district court for a reduction in amount (J.A. 58-60). Thereafter, Tarkanian moved the Court for an allowance of attorney's fees of $99,111.50 for services performed on appeal. The Nevada Supreme Court transferred that motion to the trial court for hearing (J.A. 64). The matter of attorney's fees to be assessed against the NCAA is still pending.

SUMMARY OF ARGUMENT

The respondent ("Tarkanian") claims that the National Collegiate Athletic Association ("NCAA") deprived him of liberty and property rights without due process of law, in violation of the Fourteenth Amendment to the United States Constitution and of 42 U.S.C. § 1983. To sustain this claim, and a claim for attorney's fees, he must establish that the NCAA's hearings and determinations concerning the intercollegiate athletic program of the University of Nevada at Las Vegas ("UNLV") constituted "state action".

Under this Court's 1982 decision in *Lugar v. Edmondson Oil Company, Inc.*, 457 U.S. 922 (1982), the respondent's required state action showing consists of two necessary elements. If either is lacking, there is no state action. First, respondent must show that "the deprivation [was] caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Id.* at 937. Second, he must establish

that "the party charged with the deprivation [was] a person who may fairly be said to be a state actor." *Id.*

Tarkanian's case fails because he can make neither of the required showings. The substantive source of any deprivation Tarkanian suffered was not a statute, regulation or any other governmental policy. The only source of authority for the NCAA's action was its own regulations, promulgated and enforced by the Association for the purpose of ~~maintai~~ining satisfactory standards of sportsmanship, scholarship and amateurism in the conduct of its intercollegiate athletic programs. The NCAA did not rely upon any statute, regulation, policy or custom of UNLV or the State of Nevada in taking any action of which Tarkanian complains. The lower courts' reliance upon the fact that UNLV is a public institution completely misses the point. The NCAA is a private, voluntary association composed of both public and private members The rules that it enforces—the focus of *Lugar's* first prong—are applied equally to the intercollegiate athletic programs of public and private member institutions. In either instance, the NCAA acts under private rules.

Tarkanian's case also fails to satisfy *Lugar's* second prong. The Nevada Supreme Court concluded that the NCAA was a state actor because it had exercised a power that is traditionally and exclusively the prerogative of the sovereign, namely, the discipline of UNLV's employee. That conclusion rests on a faulty premise. The NCAA did not and could not suspend Tarkanian from coaching for two years or otherwise change his employment relationship. The NCAA simply determined the conditions under which UNLV would be permitted to continue to participate in the Association's activities. The only action

taken by the NCAA was to determine that its standards of conduct regarding intercollegiate athletics had been breached and that UNLV's temporary suspension of Tarkanian would be an appropriate corrective action. The setting of standards for competition in intercollegiate athletics and the determination of whether those standards have been breached are not traditionally exclusive state prerogatives.

Furthermore, Tarkanian also has failed to establish a nexus between the state and the NCAA's imposition of sanctions sufficient to establish that the NCAA was a state actor when it determined the conditions upon which UNLV would be permitted to remain in good standing. UNLV did not make or contribute to the decision that ultimately led to Tarkanian's lawsuit. In fact, UNLV actively opposed the NCAA Committee on Infractions and Council proceedings and very reluctantly adopted the Committee's suggestion that an appropriate corrective action would be to temporarily suspend Tarkanian from UNLV's intercollegiate basketball program. Thus, the action of which Tarkanian complained was the action of a private, voluntary association, the NCAA. It was the NCAA which determined that its rules had been violated, and it was the NCAA which took steps that in its judgment were appropriate to fulfill the NCAA policies and principles.

The only arguable state action occurred when the University *responded* to the Association's application of its rules to UNLV and Tarkanian. UNLV's response was to temporarily suspend Tarkanian. That response, however, was UNLV's action, not the NCAA's.

In order to succeed against the NCAA, Tarkanian must show both that his deprivation resulted from application of a governmental rule, and that it was implemented either by a state actor or someone for whom the state is responsible. He has shown neither. He therefore has failed to make out a Fourteenth Amendment claim against the NCAA.

ARGUMENT

This case involves the holding of a Nevada trial court (J.A. 16-44), affirmed by the Supreme Court of Nevada (J.A. 45-61), that the NCAA and UNLV deprived Tarkanian of property and liberty rights without adequate process required by the Fourteenth Amendment to the United States Constitution. By its terms, the Fourteenth Amendment,[1] and its companion statute, 42 U.S.C. § 1983,[2] impose a due process requirement only on the actions of states. They impose no limitations on the conduct of private actors. Thus, the judgment can-

1. The Amendment reads, in relevant part: "No State shall . . . deprive any person of life, liberty or property without due process of the law."

2. 42 U.S.C. § 1983, which was enacted pursuant to the authority of Congress to enforce the Fourteenth Amendment, prohibits interference with federal rights under color of state law. *Rendell-Baker v. Kohn*, 457 U.S. 830 838 (1982). It states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

For the purposes of this brief, the NCAA will assume that the conduct proscribed by the Fourteenth Amendment and Section 1983 is the same and will be termed "state action."

not stand unless the NCAA's imposition of sanctions against the UNLV intercollegiate basketball program constituted state action.

Because the Fourteenth Amendment literally proscribes only action by states, this Court originally applied constitutional restraints to government actors only. *See, e.g., Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (1907) (administrative agencies); *Saunders v. Shaw*, 244 U.S. 317 (1917) (courts); *Lovell v. City of Griffin, Ga.*, 303 U.S. 444 (1938) (municipal ordinances). Accordingly, it was implicit that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974). Few private actors were held subject to the Fourteenth Amendment or Section 1983 before World War II.

I. PRIVATE ACTION MAY BE TREATED AS STATE ACTION UNDER THE FOURTEENTH AMENDMENT ONLY WHEN IT IS FAIRLY ATTRIBUTABLE TO THE STATE

From 1946[3] until the early 1970's, state action was extended to private entities in a number of cases. Two distinct models developed for reaching private action. The earliest cases involved performance by a private party of vital and comprehensive governmental functions. In

3. Arguably, the expansion of state action doctrine to the private sector was foreshadowed in the so-called *White Primary Cases*, decided between 1927 and 1953. *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953). All four cases involved racial discrimination in primary elections in Texas.

Marsh v. State of Alabama, 326 U.S. 501 (1946), this Court considered a First Amendment challenge to the trespass conviction of a Jehovah's Witness for distributing religious literature in a company town. Although the town had many of the indicia of a municipality, it was not a formal government entity. The Court held, nevertheless, that the owners of the town were subject to the restraints of the Fourteenth Amendment, terming the operation of a company town a "public function". *Id.* at 506, 507. By 1968, this public function test had been applied successfully to a privately owned park, *Evans v. Newton*, 382 U.S. 296 (1966), political party primaries, *Terry v. Adams*, 345 U.S. 461 (1953), and a privately owned shopping center, *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). Each such case concerned the exercise by a private party of some function or power traditionally associated with sovereignty.

A second, more subtle application of the state action doctrine arose in cases where a private party was the vehicle for carrying out a policy firmly associated with the state. In *Shelley v. Kraemer, supra*, for instance, a racially restrictive covenant forbidding the transfer of a white homeowner's land to nonwhites was held to be an unconstitutional denial of equal protection. Government involvement was found in state court enforcement of the restrictive covenant. 334 U.S. at 17-18. *Shelley v. Kraemer* focused on the entanglement or connection between the government and the private entity. This connection, or "nexus", required some degree of direct government involvement. Over a relatively short period of time, the Court extended state action to other entities significantly connected to the state. *See, e.g., Public*

Utilities Commission v. Pollak, 343 U.S. 451 (1952); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

Even as it identified circumstances under which private actors could be state actors, however, this Court made it clear that the Fourteenth Amendment did not apply to a private entity simply because it "receives any sort of benefit or service at all from the State, or [because] it is subject to state regulation in any degree whatever." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972). Thus, racially discriminatory conduct by a private club in *Moose Lodge* was not constrained by the Fourteenth Amendment where the individual could not trace his injury to the state's regulatory involvement. The Court upheld the value of associational privacy where the governmental licensing practice (*i.e.*, the State's award to the club of a liquor license) did not influence the Lodge's discriminatory policy.

Similarly, in *Jackson v. Metropolitan Edison Co., supra*, the Court held that respondent's status as "a heavily regulated, privately owned utility, enjoying at least a partial monopoly," together with action which was "found permissible under state law," was "not sufficient to connect the State . . . with respondent's action." 419 U.S. at 358. Rather, the Court demanded "a sufficiently close nexus between the State and *the challenged action* of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351 (emphasis added). Because the petitioner had not shown that the State was "sufficiently connected with respondent's action in terminating petitioner's service," she had failed to make out a claim under the Fourteenth Amendment. *Id.* at 358.

The Court's rationale for limiting the circumstances in which private action can be imputed to the State is that due process and equal protection requirements can impinge significantly upon legitimate associational activities and private choices, which the Constitution plainly was not intended to forbid and, in fact, may even protect. "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). Thus, it is not the province of the judiciary to interfere with these private associational activities, unless they have clearly lost their private character and have become actions fairly attributable to the state.

Prior to 1982, this Court generally analyzed each state action case by "sifting facts and weighing circumstances" carefully to determine whether subtle involvement by the state warranted treating apparently private conduct as state action. *Burton v. Wilmington Parking Authority*, 365 U.S. at 722. And it remains true today that the question of what conduct constitutes state action "frequently admits of no easy answer." *Moose Lodge*, 407 U.S. at 172.

Nevertheless, in *Lugar v. Edmondson Oil Co., supra*, this Court provided an analytical framework within which the "facts and circumstances" of each case may be evaluated. The primary inquiry is whether the private conduct allegedly causing the deprivation of a constitutional right can be "fairly attributable to the State." 457 U.S. at 937. The Court posed two central questions to characterize this fair attribution, both of which must be answered in the affirmative to support conversion of private action into state action. First, has the "claimed deprivation . . . resulted from the exercise

of a right or privilege having its source in state authority[?]" And, second, can the actors "be appropriately characterized as 'state actors'[?]" *Id.* at 939.

With these two questions, *Lugar* sharply focused the inquiry: courts must first ask whether the challenged conduct results from state law, such as a statute or regulation, or from a private source. If the source of authority is not the state, the inquiry ends, for there is no state action. *Polk County v. Dodson*, 454 U.S. 312 (1981).

Where the deprivation has its source in state authority, the court must still consider whether the private person "may fairly be said to be a state actor." *Lugar*, 457 U.S. at 937. This inquiry focuses on whether the private party "has acted together with or has obtained significant aid from state officials, or [whether] his conduct is otherwise chargeable to the State." *Id.* Without this second test, "private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Id.* If a sufficient nexus does not exist, again the inquiry must end, for there is no state action.

II. TARKANIAN'S ALLEGATIONS IN THIS CASE FAIL TO SATISFY EITHER OF THE REQUIREMENTS IDENTIFIED IN LUGAR

The court below held, in a single paragraph at the end of its state action analysis, that the NCAA satisfied both the "state law" and "state actor" elements of the *Lugar* test (J.A. 52). In order to demonstrate the Nevada Supreme Court's error, we will first show that the NCAA

acted under its own law in adopting and enforcing rules regarding the governance of intercollegiate athletic competition among member schools, and not the law of any state. We will then demonstrate that, under this Court's precedents, the NCAA cannot fairly be said to be a state actor.[4]

A. The NCAA's Action Is Attributable To Private Rules And Not To State Law

It is easier in some instances than in others to determine whether a private entity acts under state law or private rule. However, in every case the inquiry must be made: can the action by the private party be "ascribed to a governmental decision[?]" *Lugar*, 457 U.S. at 938. Some action, such as eminent domain, *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 353, or statutory prejudgment attachment, *Sniadach v. Family Finance Corp. of Bayview*, 395 U.S. 337 (1969), *Fuentes v. Shevin*, 407 U.S. 67 (1972), will clearly derive from state law.

Just as clearly, state action can be summarily rejected if the private actor is operating under private

4. Prior to *Lugar*, several lower courts held that regulatory activity by the NCAA constitutes state action. *See Howard University v. N.C.A.A.*, 510 F.2d 213 (D.C. Cir. 1975); *Parish v. N.C.A.A.*, 506 F.2d 1028 (5th Cir 1975); *Associated Students, Inc. v. N.C.A.A.*, 493 F.2d 1251 (9th Cir. 1974). These decisions found the required state action principally in the fact that some of the NCAA's member institutions are state schools. However, this Court's decisions in *Lugar*, *Rendell-Baker v. Kohn*, *supra*, and *Blum v. Yaretsky*, 457 U.S. 991 (1982), completely undermined the basis for these prior holdings. Indeed, recent lower court decisions which have faced the issue—with the exception of the Nevada Supreme Court in this case—have consistently held that NCAA regulation is not state action. *See Karmanos v. Baker*, 816 F.2d 258 (6th Cir. 1987); *Graham v. N.C.A.A.*, 804 F.2d 953 (6th Cir. 1986); *Arlosoroff v. N.C.A.A.*, 746 F.2d 1019 (4th Cir. 1984); *Hawkins v. N.C.A.A.*, 652 F.Supp. 602 (C.D. Ill. 1987); *Kneeland v. N.C.A.A.*, 650 F.Supp. 1047 (W.D. Tex. 1986); *McHale v. Cornell Univ.*, 620 F.Supp. 67 (N.D.N.Y. 1985).

rules. For example, in *Polk County v. Dodson, supra*, the plaintiff alleged that several of his constitutional rights were violated by a public defender who refused to prosecute an appeal she considered frivolous. This Court observed that the public defender acted according to the canons of professional ethics in a role adversarial to the state, and not on the basis of state law. Because those canons are private rules adopted by lawyers, and because the plaintiff could point to no rule of conduct or policy for which the state was responsible, the actions of the public defender in representing her client were not fairly attributable to the state. 454 U.S. at 320-25. The fact that the public defender was a full time state employee, working in an office fully funded and extensively regulated by the state, did not warrant a finding that she was acting under color of state law. *Id.* at 322 n.13.[5]

It is not enough that a state statutory scheme exists which permits the action taken by the private party. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 160 n.10 (1978) ("It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere exis-

5. *See also Gilmore v. Salt Lake Community Action Program*, 710 F.2d 632 (10th Cir. 1983), where the plaintiff raised constitutional challenges to his termination of employment by a Utah community action agency, a state entity. The court found the discharge did not "in any way [reflect] a governmental policy or decision", *Id.* at 639, despite the fact the agency's board, which formulated the personnel policies under which plaintiff was fired, was composed partially of public officials. "Although the public officials serve on the board as representatives of local government and as advocates of governmental objectives, there are no allegations that they represent or advocate a governmental position on personnel policy." *Id.* at 638-39. Thus, the termination of plaintiff was not a result of state law.

tence of a body of property law in a State, whether decisional or statutory, itself amounted to 'state action' even though no state process or state officials were ever involved in enforcing that body of law."). Nor is it sufficient that the state "acquiesce[s]" in the private conduct. *Id.* at 164 ("This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State."). Rather, the state must, by its statutes, customs or decisions, order or compel the offending conduct. *Id.; Moose Lodge No. 107 v. Irvis,* 407 U.S. at 176-77.[6] Otherwise, the action is private and the inquiry ends.

In a companion case to *Lugar,* this Court demonstrated that decisions made by private entities, to which the state merely "reacts", are not fairly ascribable to the state, despite extensive state regulation and funding of the private entities. *Blum v. Yaretsky, supra.*[7] In *Blum,* the State of New York, as a participant in the Medicaid program established by the Social Security Act, 42 U.S.C. § 1396 *et seq.* (1976 as amended), provided

6. Two opinions of this Court illustrate the requirement of government compulsion or order.

In *Peterson v. City of Greenville,* 373 U.S. 244 (1963), the black petitioners were convicted of trespass under city ordinances requiring separation of the races in restaurants. State action was clear because the city compelled the private act of discrimination, thereby removing that decision from the sphere of public choice.

In *Moose Lodge, supra,* on the other hand, a black patron sued a private club under Section 1983 for refusing to serve him. This Court rejected his argument that state action could be found in the state's regulation of the club's liquor license, for the liquor regulations in no way compelled or even influenced the challenged conduct. Those regulations that did affect the Moose Lodge were unconnected with its discriminatory policies. Thus, the Moose Lodge, in refusing to serve plaintiff, acted under private rules, not state regulations.

7. This case was decided the same day as *Lugar.*

assistance to eligible persons in private nursing homes. The nursing homes were designated as either "skilled nursing facilities" (SNF) or "health related facilities" (HRF), the latter providing less extensive, and generally less expensive, medical care than the former. 457 U.S. at 993-94.

The plaintiffs were Medicaid patients in an SNF who were transferred to a lower level of care in an HRF. *Id.* at 995. On behalf of a class of Medicaid-eligible residents of New York, plaintiffs challenged, among other things, decisions made by physicians and nursing home administrators to transfer them to lower levels of care without notice or hearing as violative of the Due Process Clause of the Fourteenth Amendment. *Id.* at 995-96, 1003, 1005. The District Court and the Court of Appeals agreed and permanently enjoined the transfers, holding that the decisions involved state action. *Id.* at 998.

This Court reversed, finding no nexus between the state and federal Medicaid regulations and the nursing homes' decisions to transfer patients to lower levels of care.[8] *Id.* at 1012. The plaintiffs, it noted, were not challenging any particular state regulation or procedure, but rather the decisions of nursing homes and physicians, which were private parties. *Id.* at 1003, 1005. These decisions were not compelled or even "influenced in any degree" by the state. *Id.* at 1005. That the state "responds" to such actions by adjusting patients' benefits "does not render it *responsible* for those actions." *Id.* (emphasis in original).

8. The Court first addressed the standing of the patients to challenge facility-initiated transfers, and found that a threatened decrease in medical benefits was sufficient to grant standing. *Blum v. Yaretsky,* 457 U.S. at 1000, 1002.

Nor did the extensive regulations governing Medicaid, including the requirements that nursing homes take all steps possible to transfer patients to appropriate levels of care, and complete and file with the state patient care assessment forms for review by the state, affirmatively command the particular transfer decisions. *Id.* at 1006-08, 1010.[9] The decisions were "medical judgments made by private parties according to professional standards that are not established by the State." *Id.* at 1008. In other words, decisions to transfer patients were not "dictated by any rule of conduct imposed by the State". *Id.* at 1009. Although patient transfers were authorized and, indeed, encouraged by state and federal regulations in order to promote economy and efficiency in nursing facilities and to save the government money, *id.* at 1006 n.16, 1008 n.19, the transfers only occurred after the decision was made by private physicians that the patient was receiving (and paying for) care not needed. *Id.* at 1008 n.19. "The State is simply not responsible for *that* decision, although it clearly responds to it." *Id.* (emphasis in original).[10]

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9. Nor was it significant that the physicians used a medical evaluation form devised by the Department of Health, for the physicians used their own medical judgment to complete the form. *Blum v. Yaretsky*, 457 U.S. at 1006 n.15. These physicians, who were not state employees, made the decision whether the patient received a high or low score on the form. *Id.* at 1006 n.16.

10. This Court did not find the requisite "substantial government encouragement" or "coercion" in Medicaid statutes that required the State to periodically send medical review teams to conduct on-site inspections of all SNF and HRF nursing homes. While acknowledging that these inspections could result in transfers of patients, which might involve state action, that did not occur in that case. *Blum v. Yaretsky*, 457 U.S. at 1009 n.21. Thus, the mere existence of a scheme by which the state *might* become involved in transfer decisions was not enough to find state action where the particular transfer complained of was not in fact made in this way. *Id.*

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The court below held that the alleged deprivation of Tarkanian's right had its source in state authority "because no third party could impose disciplinary sanctions upon a state university employee unless the third party received the right or privilege from the university" (J.A. 52). The court misapplied *Lugar* in so finding.

The "law" applied by the NCAA is its own. The Association is governed by a constitution, bylaws and executive regulations contained in a Manual (J.A. 86). The linchpin of its organizational structure is the promise of its members "to administer their athletic programs in accordance with the Constitution, the Bylaws and other legislation of the Association." NCAA Const., Art. 4 § 2(a) (J.A. 82).[11] NCAA rules apply equally to public and private universities and colleges.

The NCAA adopts its governing legislation through annual conventions, at which all member institutions are represented (J.A. 85). It is through these conventions that it promulgates rules to ensure minimum standards

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Footnote continued—

Nor were regulations which imposed a range of penalties on nursing homes that failed to transfer patients whose continued stays were medically unnecessary controlling, because "those regulations themselves do not dictate the decision to discharge or transfer in a particular case." *Id.* at 1009-10. That the state and federal regulations "encouraged" the nursing homes to transfer patients to less expensive facilities was also not controlling. *Rendell-Baker v. Kohn, supra*, 457 U.S. at 841 (reviewing the Court's holding in *Blum*).

11. This Court has previously acknowledged the beneficial role the NCAA plays in the regulation of intercollegiate athletics. "The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics. . ." *N.C.A.A. v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 120 (1984).

for scholarship, sportsmanship and amateurism (J.A. 79-80, 85).

Between conventions, the establishment and direction of the NCAA's general policy is entrusted to a Council of the members, elected at the annual convention (J.A. 84). The Council selects members to the various Committees that serve the NCAA (J.A. 94). One of these Committees, the Committee on Infractions, is empowered to enforce NCAA rules and impose sanctions on member institutions which violate the rules (J.A. 97).

In this case, Tarkanian and other representatives of UNLV were found by the NCAA Committee on Infractions and Council to have violated several rules regarding recruiting and extra benefits to student-athletes.[12] Among other sanctions, the Committee ordered UNLV to show cause why Tarkanian should not be suspended from participation in the activities of the University's intercollegiate athletic program (J.A. 180-81).[13] These findings

12. Among other violations, the NCAA Committee on Infractions found, and the NCAA Council on appeal affirmed, that Tarkanian arranged a grade of "B" for a student-athlete in violation of NCAA Bylaw 1-1-(a) (J.A. 158-160); provided free airline transportation for at least one student-athlete in violation of NCAA Const. §§ 3-1-(g)-(5), 3-1-(g)-(6) and 3-4-(a) (J.A. 124-28); pressured one athlete and his family to not cooperate with the NCAA in violation of NCAA Const. § 3-6-(a) and Bylaw 7-5-(d) (J.A. 141-50); and falsely certified his program was in compliance with NCAA rules in violation of NCAA Bylaw 4-6-(d) (J.A. 176-78).

13. UNLV disputed the Committee's findings, but acquiesced in its decision (J.A. 69-70, 71-76). Following a hearing before a university official, Tarkanian was suspended for two years from relations with UNLV's intercollegiate athletic program (J.A. 69-70). Tarkanian's employment was unaffected except as it related to NCAA-governed activities, *i.e.*, intercollegiate athletics (J.A. 70). The NCAA took no part in disciplining respondent (J.A. 69-70). It did not participate in, or appear at, the University hearing (J.A. 71).

were not made at the request of, or under the compulsion of, any state or government. Tarkanian has never urged any such state authority. Rather, he has steadfastly maintained that the deprivation of which he complains resulted from action taken by the NCAA (Tr. XI 2959).

There is no suggestion in the record or in the findings of the courts below that Nevada statutes, regulations or customs were employed, either overtly or covertly, by the Association's members in adopting rules regarding recruiting or extra benefits or in the Committee's enforcement of those rules. To the contrary, the record and opinions below are replete with references to the adversity of UNLV to these findings.

As we have seen, the challenged conduct must have its source in state law. That the state "reacts" to a private decision is insufficient to meet the first *Lugar* test. The NCAA member schools adopt and maintain the NCAA rules, not as individual institutions, but as members of a private association. The rules that UNLV violated are no more UNLV's rules than they are the rules of a private university; they are no more governmental in source when applied to UNLV than when applied to a private university. In either case, they were adopted by a voluntary, private association for the governance of that association and its members. This is insufficient to meet the first *Lugar* test.

B. The NCAA Is Not A State Actor

Even if the NCAA could be found to have acted under a rule or privilege of the State, it did not engage in state action in this case because it cannot "fairly be said to be a state actor." *Lugar,* 457 U.S. at 937. A party may be a state actor "because he is a state official, because he has acted together with or obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state." *Id.* It is not enough, however, that the private party acts under state authority or statute. "Something more" is needed. *Id.* at 939.

Lugar identified four tests under which the Court has determined, in different contexts, whether a private party is a state actor: the "public function test", the "state compulsion test", the "nexus test" and the "joint action test". *Id.* at 939. The Nevada Supreme Court held that the NCAA was a state actor under both the "public function" (J.A. 51) and "nexus" (J.A. 52) standards.[14] In fact, however, the NCAA does not perform a "public function" for purposes of Fourteenth Amendment standards, nor was there a sufficient "nexus" between UNLV and the NCAA's action in this case to establish state action. The Nevada Court therefore erred in concluding that the NCAA was a state actor.

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14. The other two standards clearly are not met here. The "state compulsion" test applies when the state dominates the private entity. State compulsion is demonstrated, for instance, when a state law requires a private person to refuse service because of race. *See Peterson v. City of Greenville, supra; Baldwin v. Morgan,* 287 F.2d 750 (5th Cir. 1961). This test obviously has elements in common with the first prong of *Lugar,* and as demonstrated in our earlier discussion, no showing of compulsion has been made here.

The "joint action" test was limited in *Lugar* to prejudgment attachment cases, 457 U.S. at 939 n.21, although the Court has

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1. The NCAA Does Not Perform A Public Function

The "public function"[15] standard is this Court's oldest test for determining whether a private party is a state actor. The prototypical public function case is *Marsh v. State of Alabama, supra,* in which this Court found that a corporation performed a public function when it governed a company town. The Court's more recent cases make clear, however, that the private activities which can fairly be characterized as public functions for state action purposes are strictly limited.

These limitations most clearly appear in *Jackson v. Metropolitan Edison Co., supra.* The plaintiff contended in *Jackson* that the defendant utility performed a public function because it "provides an essential public service." 419 U.S. at 352. This Court noted, however, that "[d]octors, optometrists, lawyers . . . and [a] grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest'." *Id.* at 354. In order not to subject all of these entities to constitutional restraints, the Court

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Footnote continued—

occasionally equated it with a nexus analysis. *See, e.g., Blum v. Yaretsky,* 457 U.S. at 1010-11 (analyzing the "joint participation" of nursing homes and the state in a decision to transfer Medicaid patients); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee,* 55 U.S.L.W. 5061, 5068 n.29 (1987) (the federal government is not a "joint participant" because it did not exert any influence over the exercise of the Olympic Committee's enforcement decision). Because this is not a prejudgment attachment case, the "joint participation" standard is no different from the "nexus" standard which, as we show, is not satisfied in this case.

15. The term "public function" was coined by Justice Black in *Marsh v. State of Alabama, supra,* 326 U.S. at 506, 507.

limited the public function strand of state action analysis to activities "traditionally associated with sovereignty, such as eminent domain." *Id.* at 353. The relevant question is whether the activity is "traditionally the exclusive prerogative of the State." *Id.*

Subsequent cases have reaffirmed the Court's limited definition of "public functions."[16] In *Flagg Bros., Inc. v. Brooks, supra,* the plaintiff argued that a state statute, which authorized a bailor to sell goods entrusted to him for storage, delegated an exclusive state function to the bailor. The Court held, however, that "the settlement of disputes between debtors and creditors is not traditionally an exclusive public function." 436 U.S. at 161. The Court further noted that "[w]hile many functions have been traditionally performed by governments, very few have been exclusively reserved to the State," *id.* at 158, and suggested that even such activities as education, fire and police protection, and tax collection may not satisfy the public function standards. *Id.* at 163. It has since been held that education of children with special needs is not "the exclusive province of the State." *Rendell-Baker v. Kohn, supra,* 457 U.S. at 842.

In determining whether a private actor is performing an exclusive state function, this Court has focused on the overall course of conduct of the private entity rather than on the specific conduct being challenged. For example, in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, supra,* the plaintiffs challenged the U.S. Olympic Committee's refusal to allow the use of the trademark "Olympic" in conjunction with the plaintiffs' proposed athletic event ("Gay Olympics"). In response to an argument that the Olympic Committee was performing a public function and thus was subject to First Amendment constraints, this Court held that "[n]either the conduct nor the coordination of amateur sports has been a traditional governmental function." 55 U.S.L.W. at 5067. This holding recognizes that, in determining whether an entity is performing a "public function," the proper focus is on the entity's overall conduct and purpose.

Thus, in performing its public function analysis, this Court should focus on the NCAA's activities generally rather than on any particular action it took here.[17] The utility customer in *Jackson v. Metropolitan Edison Co.*, and the Jehovah's Witness in *Marsh v. State of Alabama* challenged specific conduct of the entities in question (*i.e.*, termination of service and restriction of distribution of literature). This Court, however did not focus on the specific conduct, but rather on the broader nature of Metropolitan Edison's business (generating and supplying electricity) and the Gulf Shipbuilding Corporation's company town (providing streets, sewers, sidewalks and other municipal services).

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16. This Court has not declared any function to be traditionally and exclusively reserved to the State since *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc., supra,* in which the activities of a private shopping center were held to be state action. Significantly, this decision was limited in *Lloyd Corp., Limited v. Tanner,* 407 U.S. 551 (1972), and overruled in *Hudgens v. N.L.R.B.,* 424 U.S. 507 (1976).

17. This is not meant to suggest that the inquiry into "public function" is not a fact-oriented inquiry, or that the Court should disregard the context in which the "public function" claim arises. *See Burton v. Wilmington Parking Authority,* 365 U.S. at 722. However, the inquiry into the conduct of the purported state actor must be broad enough to reflect accurately the entity's "function" and not merely its conduct in the particular situation in question. *Id.*

Under these standards, application of the public function doctrine to the NCAA is unwarranted. The undisputed purpose of the NCAA is to establish, implement and enforce rules governing intercollegiate athletics.[18] "Neither the conduct nor the coordination of amateur sports has been a traditional government function." *San Francisco Arts & Athletics, Inc. v. United States Olympic*

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18. Section 1 of Article Two of the NCAA Constitution, entitled "Purposes", is set out in the 1976-77 NCAA Manual (J.A. 79-80), and provides:

> **Section 1. Purposes.** The purposes of this Association are:
>
> (a) To initiate, stimulate and improve intercollegate athletic programs for student-athletes and promote and develop educational leadership, physical fitness, sports participation as a recreational pursuit and athletic excellence.
>
> (b) To uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the Constitution and Bylaws of this Association.
>
> (c) To encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism.
>
> (d) To formulate, copyright and publish rules of play governing intercollegiate sports.
>
> (e) To preserve intercollegiate athletic records.
>
> (f) To supervise the conduct of, and to establish eligibility standards for, regional and national athletic events under the auspices of this Association.
>
> (g) To cooperate with other amateur athletic organizations in promoting and conducting national and international athletic events.
>
> (h) To legislate, through Bylaws or by resolution of a Convention, upon any subject of general concern to the members in the administration of intercollegiate athletics.
>
> (i) To study in general all phases of competitive intercollegiate athletics and establish standards whereby the colleges and universities of the United States can maintain their athletic activities on a high level.

Committee, 55 U.S.L.W. at 5067. It certainly is not a function *exclusively* reserved to government.

The Nevada Supreme Court, however, found that the NCAA imposed "disciplinary sanctions upon a state university employee" (J.A. 52). Because it determined that the right to "discipline public employees is traditionally the exclusive prerogative of the state . . .," the court concluded that the NCAA was performing a public function (J.A. 51). This is an incorrect application of the "public function" standard.

First, the court erred by focusing on the ultimate outcome in a specific case (*i.e.*, Tarkanian's suspension) rather than the NCAA's overall functions and purposes. The NCAA's true function—regulation of intercollegiate athletics—is not a function traditionally and exclusively reserved to the states. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 55 U.S.L.W. at 5067; *Arlosoroff v. National Collegiate Athletic Association, supra*, 746 F.2d at 1021; *Graham v. National Collegiate Athletic Association, supra*, 804 F.2d at 958. Regulation of amateur sports simply is not on a par with the more clearly "governmental" activities found in the *White Primary Cases, supra*, and *Marsh v. State of Alabama*.

Second, the NCAA does not make personnel decisions for state (or private) universities. Its activities are much more modest. It is a voluntary association of public and private colleges and universities that agree to set minimum standards for the conduct of intercollegiate athletic programs (J.A. 80) and for the enforcement of those rules of conduct (J.A. 97-110). Member-

ship in the organization is limited to four-year schools and related entities which agree to abide by those standards (J.A. 82). Member institutions must ensure that their coaches and student-athletes abide by these rules (J.A. 82).[19] Sanctions, when imposed, are directed to the member institution, not the individuals involved in the infractions (J.A. 103). The NCAA has no authority to compel a member to comply with its rules,[20] or to hire or fire a university employee.[21] It simply determines the conditions under which a member may continue to participate in full standing in NCAA activities. And like any association, it maintains the right to limit or deny membership privileges according to its charter and bylaws (J.A. 82-83).[22] The Association simply determined in this case the conditions under which UNLV could continue to participate in full standing in NCAA activities. While these conditions represented the Infractions Committee's best judgment as to the appropriate

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19. Tarkanian admitted that he knew and understood NCAA rules when he arrived at UNLV, that he was "the head man" responsible for insuring the intercollegiate basketball program was being operated in compliance with NCAA rules (Tr. XI 2830), and that one of his obligations to UNLV was to maintain his program in compliance with NCAA rules (Tr. VIII 1981).

20. The NCAA has no subpoena or arrest powers, or any other police powers traditionally granted to law enforcement authorities.

21. The suspension of respondent was accomplished by the President of UNLV following notice and a hearing before a University hearing officer (J.A. 69-70). The NCAA did not appear or participate in that hearing (J.A. 71).

22. As a private association without the power of government, the NCAA's only overriding leverage is the ability to impose penalties upon or deny membership to an institution that chooses not to operate its intercollegiate athletic program in accord with the Association's purposes and policies.

steps to be taken, it was not the Committee or the Association which acted to implement those conditions, nor did they have the power so to act.

A holding that the NCAA performed a public function simply because UNLV responded to its finding by suspending Tarkanian is inconsistent with this Court's stated reluctance to "extend the sovereign-function doctrine outside of its present carefully confined bounds." *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 163. If the Nevada Supreme Court's analysis of the alleged constitutional violation is followed, then the same conclusion might be reached when a private credentialing agency, for instance, makes a judgment about a professional on the basis of which the state restricts his capacity to practice his profession. Such a result would ignore the admonition that the courts should "respect the limits of their own power as directed against state governments and private interests." *Lugar*, 457 U.S. at 936-37.

The Nevada Supreme Court's misapplication of the public function doctrine transforms it from a shield necessary to protect the individual in unusual cases into an intrusive sword for the judiciary. Where a private entity's characterization as a state actor is based only on the facts peculiar to the complainant, it is properly evaluated under the nexus theory rather than the public function test. But, as will be seen, the nexus theory provides no more support for the judgment below than does the public function test.

2. Tarkanian Has Failed To Show The Required Nexus Between The State And The NCAA's Action

Application of the "nexus" test clearly reveals that the NCAA was not a state actor. Since at least *Jackson v. Metropolitan Edison Co., supra,* this Court has required a close nexus between the state and the *challenged activity.*[23] Entanglements between the state and the private party are not relevant, except as they impact on the particular decision at issue. Even then, the private action is not ascribed to the state unless "it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state." *Blum v. Yaretsky,* 457 U.S. at 1004; *Rendell-Baker v. Kohn,* 457 U.S. at 840. *See also Tulsa Professional Collection Services v. Pope,* 56 U.S.L.W. 4302, 4304 (U.S., April 19, 1988) (requiring "the overt, significant assistance of state officials.") Neither extensive government regulation, *Jackson v. Metropolitan Edison Co.,* 419 U.S. at 350, nor extensive financial subsidization, *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee,* 55 U.S.L.W. at 5067, of the private entity will necessarily convert its conduct to state action. State action will not be ascribed to private conduct unless the government has compelled the private decision.

One of the clearest demonstrations of nexus analysis is set forth in this Court's opinion in *Jackson v. Metro-*

23. "But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.,* 419 U.S. at 351. *See also Blum v. Yaretsky,* 457 U.S. at 1004.

politan Edison Co. The plaintiff brought suit under Section 1983 against a privately owned and operated utility for termination of her electrical service without notice and hearing. The utility was at least a partial monopoly,[24] and held a certificate of public convenience from the state. Under a provision of its general tariff, the utility had the right to discontinue service to any customer for nonpayment of bills.[25] The plaintiff sought damages and an injunction, urging that, under state law, she had an entitlement to reasonably continuous electrical service to her home.[26]

The plaintiff launched a vigorous attack on the utility's action because it was a monopoly, heavily regulated by the state, and because the state had "specifically authorized and approved" the termination practice. 419 U.S. at 354. All of these arguments were rejected by this Court. As an initial matter, the mere fact that a private entity is subject to state regulation, even extensive and detailed, does not convert its action into that of the state. The relevant inquiry must be whether there is a sufficiently close nexus between the state and the decision of the regulated entity to discontinue service such that the action of the latter may fairly be

24. Although the monopoly status of Metropolitan Edison was in doubt, this Court's analysis assumed that it was a monopoly, but held this fact was not determinative in considering whether termination of service is state action. *Jackson v. Metropolitan Edison Co.,* 419 U.S. at 351-52.

25. The tariff provided: "*Cause for discontinuance of service.* Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of nonpayment of bill. . ." *Jackson v. Metropolitan Edison Co.,* 419 U.S. at 346 n.1.

26. Pa.Stat.Ann.,Tit. 66, § 1171 (1959) provided that: "Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities. . . Such service shall be reasonably continuous and without unreasonable interruptions or delay." *Jackson v. Metropolitan Edison Co.,* 419 U.S. at 348 n.2.

treated as that of the state itself. *Id.* at 350-51. Since the plaintiff could not show that the utility's alleged monopoly status and the state's detailed scrutiny of its rates compelled the utility's decision to terminate service to her, she failed to show the proper nexus.[27]

This Court also rejected the argument that the state had authorized or approved the termination of plaintiff's electrical service, noting that the initiative to act came from the utility, not the state. *Id.* at 357. Although the provision authorizing termination of service was included in the utility's tariff, the regulating agency had not specifically approved this provision or adopted it as its own. Thus, the petitioner could not show that the state intended either overtly or covertly to encourage the practice. The Court concluded that plaintiff's arguments taken together showed no more than that the utility was heavily regulated, enjoyed a partial monopoly, and that it elected to terminate service in a manner found permissible under state law. This was insufficient to connect the state with the action of the utility so as to make it attributable to the state. *Id.* at 358-59. For those reasons, the utility could not fairly be said to be a state actor, and the second test of *Lugar* was not met.

A more recent case further illustrates the Court's continued demand for an intimate nexus between the state and the challenged private activity. *Rendell-Baker v. Kohn, supra*, involved the discharge of several em-

27. In a number of cases, this Court has also rejected arguments that substantial (even total) state funding forms the requisite nexus. *See, e.g., Blum v. Yaretsky*, 457 U.S. at 1010-11; *Rendell-Baker v. Kohn*, 457 U.S. at 840-41; *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 55 U.S.L.W. at 5067. In none of these cases was the petitioner able to show that state funding contributed to the challenged conduct.

ployees at a private school for children with special needs. Most of the school's students were referred to it by state agencies, the school's educational programs were extensively regulated, and the school received over 90% of its funding from public sources. This Court held that these connections were insufficient to render the school's employment decisions state action.

First, the school's heavy dependence on public funds did not render it "fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government," and whose activities do not thereby become state action. 457 U.S. at 840-41. Second, the state's regulation of the school's educational services was not dispositive where the state played almost no role in personnel matters and the specific decisions at issue clearly "were not compelled or even influenced by any state regulation." *Id.* at 841.[28] Finally, the state's relatively recent decision to take financial responsibility for the education of maladjusted students at selected private schools neither established that the school performed a traditionally exclusive state function nor created a "symbiotic relationship" of the type found in *Burton v. Wilmington Parking Authority, supra*. *Id.* at 842-43. Accordingly, the Court did not find the required nexus between the state and the school's actions at issue.

Application of the principles set forth in *Rendell-Baker* and *Jackson* compels the conclusion that the requisite nexus between the state and the NCAA's actions in this case does not exist. Although the NCAA does consist of numerous public institutions, which supply at

28. The Court noted that one state agency, arguably acting beyond its authority, had opposed the firing. *Id.* at 838 n.6.

least some of its financial support, Tarkanian has neither contended nor shown that such membership or funding compelled the adoption of the rules regarding recruiting and extra benefits, or the Committee on Infractions' decision that he violated them. Indeed, it would be difficult to point to any state or group of states whose hand is felt in the NCAA. Nothing in its charter, bylaws or manual gives any state or group of states power to control the NCAA or its activities.

Nor is there any evidence of *de facto* control by any government. Decisions are made by majority (or greater) vote at annual conventions and in committee meetings (J.A. 86). Each member is entitled to only one vote (J.A. 85). No state has authority to compel members to vote in any certain way.

The bylaws and charter of the NCAA do not grant the Committee on Infractions or Council authority to hire and fire employees of member universities. No member institution has granted to the NCAA, by charter, contract or otherwise, the power to discipline its employees.[29] The Committee can only make findings that its rules have been violated by a member institution. It can impose sanctions only against the member (J.A. 103). The member institution retains the responsibility for administering and monitoring its athletic program, and for imposing sanctions upon its personnel when appropriate. But the member institution is not responsible for the Committee's findings and the conduct is not, therefore, "ascribable to the state." At most, the member institution might "react" to the Committee's decision or findings

29. Even if member universities did authorize the NCAA to discipline employees, the mere existence of this grant does not compel or substantially encourage the Committee's decision to discipline in a given case, as required by *Jackson v. Metropolitan Edison Co.* and *Blum v. Yaretsky*.

by taking some action against the perpetrators of the violation.

In this case, Tarkanian and other UNLV personnel were found by the NCAA Committee on Infractions to have violated several rules regarding recruiting and providing extra benefits to student-athletes.[30] The Committee ordered UNLV to show cause why Tarkanian should not be suspended from participation in the activities of the university's intercollegiate athletic program (J.A. 180-81). These findings were not made at the request of, or under the compulsion of, any state or government.[31] It was the Association whose rules were violated and it was the Association which took action to vindicate those rules. The decision to impose sanctions, as well as the content of those sanctions, was made by the NCAA's Committee on Infractions and Council. UNLV was the resisting, unwilling, and detrimental recipient of the sanctions, not their instigator (J.A. 69-70, 71-76). At most, the University "reacted" to the Committee's decision by independently deciding to suspend Tarkanian. This reaction, however, does not establish a nexus between the state and the previous decision of the NCAA. *See Blum v. Yaretsky*, 457 U.S. at 1005.

Blum v. Yaretsky and *Rendell-Baker v. Kohn* exemplify the general principle that a regulatory and funding relationship between governmental and non-governmental entities does not necessarily impose constitutional restraints on the non-governmental entity. Only where the government regulation or subsidy compels the action taken does the requisite "nexus" occur.

30. *See* n.12 *supra*.

31. Tarkanian has never maintained otherwise. Rather, he has steadfastly maintained that the deprivation of which he complains resulted from action taken by the NCAA.

In sum, the NCAA's supervision of intercollegiate athletics neither occurs under a rule imposed or privilege granted by the state nor is it sufficiently connected with the state to render the NCAA a state actor. For both of these reasons, the NCAA does not engage in state action, and therefore Tarkanian's challenge under the Fourteenth Amendment to the NCAA's actions concerning UNLV should have been dismissed.

CONCLUSION

The Nevada Court enjoined the enforcement by UNLV and the NCAA of the penalties imposed upon UNLV with respect to Tarkanian pursuant to the Committee on Infractions' Confidential Report No. 123(47) (J.A. 122-205). For the reasons stated above, the court was in error. Its judgment should be reversed, and the injunctions should be dissolved. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 180 (1972).

Respectfully submitted,

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